

CR 1705/1998

BEFORE

THE HON'BLE MR JUSTICE I.A.ANSARI

CIVIL RULE 1705/1998

1. M/s. Nandalal Parshuram,

A partnership Firm and Proprietor of a Tea Garden named Sookerating Tea Estate, Doomdoma, Bishmile, PO. Chabua, Dist. Dibrugarh, Assam, Pin-786 184.

2. Shri Kanhaiya Agarwalla,

Partner of the petitioner No.1 Firm

R/O. Bishmile, PO. Chabua, Dist. Dibrugarh, Assam.

& Petitioners

By Advocate: Dr. AK Saraf, Sr. Advocate

Mr. D. Baruah,

Ms. N. Hawelia,

Ms. ML Gope.

- Versus -

1. Agricultural Income Tax Officer, Assam, Kar Bhawan, Dispur, Guwahati.

2. Commissioner of Taxes, Assam,
Kar Bhawan, Dispur, Guwahati.

3. The Superintendent of Taxes,
Unit Tinsukia, PO. Tinsukia, Assam

4. The State of Assam,
Represented by the Secretary to the Govt. of Assam,
Finance Department, Dispur, Guwahati.

& Respondents

By Advocate: Mr. R. Dubey

BEFORE

THE HON'BLE MR. JUSTICE IA ANSARI

Date of hearing & date of judgment : 16.08.2007

JUDGMENT AND ORDER

(ORAL)

The material facts, which are not in dispute and which have given rise to the present writ petition, may, in brief, be set out as follows:

(i) The petitioner No. 1, namely, M/s Nandalal Parshuram, a registered partnership firm under the Partnership Act, owns a Tea Estate known as Sookerating Tea Estate, Doomdoma, Assam, and is engaged in the business of plantation, manufacture and sale of tea, the petitioner No. 2 being a partner of the petitioner firm. The respondent No. 1, namely, Agricultural Income Tax Officer, Assam, assessed the agricultural income tax payable by the petitioner firm, for the assessment years 1986-87, 1987-88 and 1990-91, at Rs.4,80,559/-, Rs.3,33,342/- and Rs. 77,627/- respectively. Having so completed assessment of the agricultural i

income tax, respondent No.3 raised demand, on 30.03.95, for payment of Rs 4,80,559/-, Rs.3,33,342/- and Rs. 77,627/- under Section 23 of the Assam Agricultural Income Tax Act, 1939 (in short, 'the said Act'), directing the petitioner firm to make payment of the assessed amount by 30.04.1995. By letter, dated 08-12-1995, issued by the respondent No.1, the petitioner firm was informed that the petitioner firm was in default of payment of Rs. 4,80,559.00/-, Rs. 3,33,342.00/- and Rs. 77,627.00/-, as agricultural income tax, for the assessment years 1986-87, 1987-88 and 1990-91 respectively and that the assessed amount should be paid by 26-12-1995 making it clear that if the payment was not made by 26.12.95, necessary action, under Section 36(2) and 36(3) of the said Act, would follow. By a subsequent assessment order, dated 04.04.96, the Agricultural Income Tax for the assessment year 1990-91, in respect of the petitioner firm, was revised to Rs.2,64,319/- and a demand for payment of the revised assessment was accordingly raised by the respondent No.1, on 04.09.96, with direction that the said revised assessed amount of Rs. 2,64,319/- be paid by 04.10.1996. The petitioner firm, thereafter, received a notice, dated 08.01.98, whereby the petitioner firm was directed to make payment of Rs.5,86,025/- as agricultural income tax for the assessment year 1990-91 within seven days from the date of the receipt of the said notice. This notice was followed by two other notices, both dated 19.01.98, whereby the petitioner firm was directed to pay, within seven days from the date of receipt of the said notices, Rs. 10,42,903 as agricultural income tax for the assessment year 1986-87 and Rs.7,77,091/- as agricultural income tax for the assessment year 1987-88. By three different letters, all dated 19.02.98, the petitioner firm informed the respondent No.3 that for the assessment years, in question, i.e., 1986-87, 1988-89 and 1990-91, the demands raised by letters, dated 08.01.98 and 19.01.98, aforementioned were higher than the assessment orders made in this regard inasmuch as the assessment made in respect of the assessment year 1986-87 was Rs.4,80,559/-, but the demand raised for payment by letter, dated 19.01.98, was to the tune of Rs.10,42,903/- and, similarly, in respect of the assessment years 1987-88 and 1990-91, the assessment made were Rs.3,33,342/- and Rs.2,64,319/- respectively, but the demands for payment of the assessment years 1987-88 and 1990-91 were to the tune of Rs.7,77,091/- and Rs.5,86,025/- respectively. The petitioner firm, vide their letters, dated 19.02.98, aforementioned also informed the respondent No.3 that the petitioner firm had already filed statutory appeal and, therefore, requested the respondent No.3 to keep the realization of the alleged dues in abeyance until disposal of the appeal. Reacting to the letters of the petitioner firm, dated 19.02.98, aforementioned, respondent No.3 clarified, vide letter, dated 11.03.98, that while the assessment of the agricultural income tax, for the assessment year 1986-87, was Rs.4,80,559/-, the interest and penalty payable thereon were Rs.81,841/- and Rs. 4,80,500/- respectively, making grand total of liability of the petitioner firm, for the assessment year 1986-87, to the tune of Rs.10,42,903/- and, similarly, in respect of assessment years 1987-88 and 1990-91, while the tax assessed were Rs.3,33,342/- and Rs.2,64,319/- respectively, the interest and penalty payable, in respect of the assessment year 1987-88, were Rs.1,10,449/- and Rs.3,33,300/- respectively and that the interest and penalty payable, for the assessment year 1990-91, were Rs.57,405/- and Rs.2,64,300/- respectively. Thus, the total sum payable by the petitioner firm in respect of assessment years 1987-88 and 1990-91 were to the tune of Rs.7,77,091/- and Rs.5,86,025/- respectively. By yet another letter, dated 18.03.98, respondent No.3 informed the petitioner No.1 that without any stay order having passed in the appeal, recovery proceeding, commenced against the petitioner firm, cannot be kept in abeyance. Aggrieved by the imposition of penalty, as indicated hereinbefore, the petitioners have impugned the same in the present writ petition, the main ground of challenge being that no notice was issued to the petitioner firm in terms of the provisions of Section 36(2) of the said Act before the penalty was imposed on the petitioner firm.

2. I have heard Dr. A. K. Saraf, learned Senior counsel, appearing on behalf of the petitioners, and Mr. R. Dubey, learned counsel, appearing for the respondents.

3. Though the respondents have not filed any affidavit, they have contended, at the time of hearing of this writ petition, that a notice directing payment of the dues was issued to the petitioner firm, on 14.02.1997, in terms of Section 36(2). However, no copy of the notice, which the respondents claim to have issued, has been produced at the time of hearing. Though the respondents have produced the records, the records too do not, admittedly, reflect as to what was the nature of the letter(s)/notice(s), which the respondents claim to have issued to the petitioner firm. Be that as it may, the fact that the respondents had issued letters/notices, dated 19-01-1998, aforementioned directing the petitioner firm to make payment of Rs. 10,42,903.00/-, Rs.7,77,091/- and Rs. 5,86,025/- for the assessment years 1986-87, 1987-88, 1990-91 respectively within a period seven days from the date of the receipt of the notices is not in dispute.

4. What emerges from the above discussion is that a period of seven days had been given to the petitioner firm to make payment of their alleged dues and it is contended by the respondents that due to non-payment of the amounts, so claimed, the penalty was imposed.

5. Before proceeding further, it is of great relevance to note that while the amounts assessed, as agricultural income tax, and the amounts, claimed as interest, have been paid by the petitioner firm, it is the imposition of penalty, which stands impugned in the present writ petition. It, now, needs to be noted that imposition of penalty is dealt with by Section 36 of the said Act. The relevant provisions of Section 36 read as under :

36. Mode of recovery. (1) If the demand in respect of any dues under this Act is not paid on or before the date specified in section 35 -G and 35H, the assessee shall be deemed to be in default:

Provided that the Superintendent of Taxes or Agricultural Income-tax Officer may, in respect of any particular assessee and for reasons to be recorded in writing, extend the date of payment of dues or allow such assessee to pay the same by instalments and in such cases the assessee shall not be deemed to be in default, but in all such cases the provisions of sections 35C, 35D and 35E shall apply.

(2) Where an assessee is in default, the Superintendent of Taxes or Agricultural Income-tax Officer may, in his discretion, direct that in addition to the amount due, a sum not exceeding that amount shall be recovered from the defaulter by way of penalty:

Provided that no order of imposition of penalty under this section shall be made unless the assessee has been heard or has been given a reasonable opportunity of being heard.

(3) Where an assessee is in default, the Superintendent of Taxes or Agricultural Income-tax Officer may order that the amount due shall be recoverable as an arrear of land revenue and may proceed to realise the amount as such.

6. From a close reading of Section 36, what transpires is that if the payment of dues is not made on or before the date specified in a notice of demand, the assessee shall be deemed to be a defaulter and in such a case, Section 36(2) empowers the Superintendent of Taxes and the Agricultural Income Tax Officer to recover, by way of penalty, a sum not exceeding the amount, which is in default.

The proviso to Section 36(2), however, requires the assessing authority not to impose penalty unless the assessee is heard or is given reasonable opportunity of being heard. Necessarily, therefore, imposition of penalty for default is not permissible without giving, at least, an opportunity of showing cause and hearing to the assessee concerned.

7. A careful reading of Section 36(2) also clearly reveals that if, pursuant to a demand made in respect of any dues under the said Act, the assessee does not pay his dues on or before the due date, the assessee shall be deemed to be a

defaulter. Power has, however, been conferred on the authority concerned to extend the date of payment of the dues or even to allow an assessee to pay the assessed tax in installments and in such a case, the assessee will not be deemed to be a defaulter till the date as extended or till the last date of payment by installment is over. When an assessee is in default within the meaning of Sub-Section (1) of Section 36, because of the fact that he has not made payment of the tax within the time, originally, given or within the extended time, the Agricultural Income Tax Officer or Superintendent of Taxes, as the case may be, has the power to impose, by way of penalty, a sum not exceeding the amount, which the assessee has failed to pay as the assessed tax. The power to levy penalty is, thus, in addition to the power to order recovery of the assessed tax as arrear of land revenue.

8. From the scheme of Section 36, it becomes abundantly clear that imposition of penalty is not a routine affair nor can the penalty be imposed as an automatic consequence of a default in making payment of the tax. Non-payment of tax in itself is not sufficient to attract a penalty, for, such non-payment merely makes an assessee defaulter and a discretion has been vested in the authority concerned to extend the date of payment and/or to allow the assessee to make payment of the assessed tax in installment and not to treat him as defaulter till expiry of the extended date. When discretion is vested in an authority, such a discretion cannot be arbitrarily exercised. The exercise of power to impose penalty is circumscribed inasmuch as the authority concerned must, before imposing the penalty, give an opportunity of hearing to the assessee. Having given such an opportunity, the authority concerned shall take into account all relevant circumstances and eschew from consideration every irrelevant circumstance and, then, determine as to whether the assessee needs to be saddled with the liability of penalty for non-payment of his dues and if so, what would be the extent of such a penalty? The authority concerned must, thus, take a decision, in the matter of imposition of penalty, objectively, upon consideration of all relevant factors.

9. In the light of the law discussed above, when I revert to the factual matrix of the present case, what attracts the eyes, most prominently, is that notwithstanding the fact that letters, dated 18.12.95, were issued by the respondent s, demanding payment of Rs.4,80,559/-, Rs.3,33,342/-, and Rs.77,627/- (which was revised to Rs.2,64,319/-) for the assessment years 1986-87, 1988-89 and 1990-91 respectively, with a caution that the demands, if not immediately met, would entail recovery proceeding under Section 36, no notice was given to the petitioner firm to show cause as to why penalty, as provided by Section 36(2), be not imposed on the petitioner firm for their failure to make payment of the assessed tax. In fact, by letters, dated 19.01.88 and 08.01.98, aforementioned, what were demanded were not only the payment of tax and interest, which had accrued thereon, but also the penalty, which had been imposed for the failure to pay assessed tax in respect of assessment years 1986-87, 1987-88, 1990-91. Thus, the letter, dated 19.01.98 and 08.01.98, aforementioned could not have been regarded, and cannot be legally treated, as notices under the proviso to Section 36(2).

10. In short, in the case at hand, the respondents have neither averred by way of affidavit nor have they produced any material to indicate that notice, as is required under Section 36(2), was ever given to the petitioner firm directing them to show cause as to why the penalty shall not be imposed on the petitioner firm for their failure to pay the assessed tax within the time given to them by the assessing authority concerned. Viewed from this angle, it becomes clear that the imposition of penalty on the alleged non-payment of dues was wholly in violation of the safeguard guaranteed to an assessee under proviso to Section 36(2). Thus, the penalty imposed by the respondent No. 3 by its letters, dated 19-01-1998 and 08.01.98, aforementioned and reiterated by its letter, dated 11-03-1998, cannot be sustained.

11. In the result and for the reasons discussed above, this writ petition su

ceeds. While the demands for payment of tax and the interest, which had accrued thereon, are not interfered with, the penalty of Rs. 4,80,500.00, Rs. 3,33,300.00 and Rs. 2,64,300.00, imposed in respect of the assessment years 1986-87, 1987-88 and 1990-91 respectively, is hereby set aside and quashed.

12. With the above observations and directions, this writ petition shall stand disposed of.

13. No order as to costs.